78-1634

No.

Supreme Court, U. S.
FILED
APR 24 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF REGION 14 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, AND PET, INCORPORATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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100 LRRM 2739

INDEX

	page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
Facts	3
Proceedings Below	4
REASONS FOR GRANTING THE WRIT	9
I. There Is A Conflict Among The Circuits On A Fundamental Question As to the Meaning of § 10(*l*)—Whether the Courts Are Required To Issue Injunctions Against Conduct They Believe To Be Lawful. In View of the Frequency of § 10(*l*) Injunctions, And the Critical Role Such Injunctions Play In Affecting the Outcome of Labor Disputes, It is Vital that This Court Resolve the Conflict	9
II. There Is An Important Unresolved Question Whether § 10(*l*) Requires Courts To Issue Injunctions Without Resolving Substantial Claims That the Conduct To Be Enjoined Is Protected By the First Amendment	14
III. The Decision Below Construes § 10(*l*) in A Manner Which Raises Series Questions As to the Constitutionality of § 10(*l*) — Indeed, Which Renders § 10(*l*) Unconstitutional Under Controlling Decisions of This Court	15
CONCLUSION	18

TABLE OF AUTHORITIES

Cases: *page*

Blount v. *Rizzi*, 400 U.S. 410 (1971) 16

Boire v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185 (5th Cir. 1975) 10

Carroll v. *President & Commissioners*, 393 U.S. 175 (1968) 16

Chicago Typographical Union No. 16, 151 NLRB 1666 (1965) 7

Crowell v. *Benson*, 285 U.S. 22 (1932) 16-17

Danielson v. *Joint Bd. of Coat, Suit & Allied Gar. Wrks. U.*, 494 F.2d 1230 (2d Cir. 1974) (Friendly, J.) 11-12

Electrical Workers v. *NLRB*, 341 U.S. 694 (1951) .. 15

Freedman v. *Maryland*, 380 U.S. 51 (1965) 16

Great Western Broadcasting Corp. v. *NLRB*, 356 F.2d 434 (9th Cir. 1966), enforcing 150 NLRB 467 (1964) 7

Hendrix v. *Operating Engineers, Local 671*, —— F.2d ——, 100 LRRM 2704 (8th Cir. 1979) 10, 13

Humphrey v. *Intern. Longshoremen's Assn., AFL-CIO*, 548 F.2d 494 (4th Cir. 1977) 11

Kennedy v. Los Angeles Typographical Union, 418 F.2d 6 (9th Cir. 1969) 10

Labor Board v. *Servette, Inc.*, 377 U.S. 46 (1964) ... 6

Local Joint Board, Hotel & Restaurant Emp. v. *Sperry*, 323 F.2d 75 (8th Cir. 1963) 12-13

Meat Cutters, Local 248, 230 NLRB No. 27 (1977) 7

NLRB v. *Fruit & Vegetable Packers*, 377 U.S. 58 (1964) 15, 16

NLRB v. *Upholsters Local 61*, 331 F.2d 561 (8th Cir. 1964) 7

Operating Engineers Local 139, 226 NLRB 759 (1976) 7

Samoff v. *Building & Const. Tr. Council of Philadelphia*, 475 F.2d 203 (3rd Cir. 1973), vacated on other grounds, 414 U.S. 808 (1973) 10, 11

Schauffler v. *Local 1291, International Longshoremen's Association*, 292 F.2d 182 (3rd Cir. 1961) .. 12

Sheet Metal Workers Local No. 54, 175 NLRB 362 (1969) 7

Southeastern Promotions Ltd. v. *Conrad*, 420 U.S. 546 (1975) 16

Squillacote v. *Building Construction Trade Council*, 266 F.Supp. 971 (E.D. Wisc. 1967) 7

Squillacote v. *Graphic Arts Intern. Union, AFL-CIO*, 540 F.2d 853 (7th Cir. 1976) 10-11

Yakus v. *United States*, 321 U.S. 414 (1944) (Rutledge, J., dissenting) 17

Statutes:

National Labor Relations Act, 29 U.S.C. §§ 151 *et seq:*

§ 8(b)(4), 29 U.S.C. § 158(b)(4) 5, 7, 8, 9, 13, 14

§ 8(b)(7), 29 U.S.C. § 158(b)(7) 9, 13, 14

§ 8(e), 29 U.S.C. § 158(e) 9, 13

§ 10(*l*), 29 U.S.C. § 160(*l*) ..... passim

Norris-LaGuardia Act § 4, 29 U.S.C. § 104 10

Miscellaneous:

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953) 16

National Labor Relations Board, *Annual Reports* .. 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United Steelworkers of America, AFL-CIO-CLC, petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, enabling this Court to review the Eighth Circuit's judgment in *Solien* v. *United Steelworkers of America, AFL-CIO-CLC*, No. 78-1411 (8th Cir. 1979).

OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Missouri are not officially reported, and are reprinted herein at App. 14a-20a. The opinion of the United States Court of Appeals for the Eighth Circuit is not yet officially reported, and is reprinted herein at App. 1a-12a. The Eighth Circuit's denial of a motion to stay its mandate is reprinted herein at App. 13a.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Eighth Circuit were issued on February 22, 1979 (App. 1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does § 10(*l*) of the National Labor Relations Act, 29 U.S.C. § 160(*l*), require a district court, on application of a Regional Director of the National Labor Relations Board, to issue an injunction against conduct which the court believes is lawful, simply because the court cannot say that the Regional Director's contrary contention is "insubstantial and frivolous?"

2. Where a court concludes that a § 10(*l*) injunction is otherwise appropriate, but the union contends that issuance of the injunction would violate its First Amendment rights and the court believes that contention substantial, is the court required by § 10(*l*) to issue the injunction without deciding the validity of the First Amendment claim?

3. If § 10(*l*) requires the issuance of injunctions against conduct which the court believes lawful, and without adjudicating First Amendment questions which the court recognizes to be substantial,

(a) Does § 10(*l*) violate the First Amendment by requiring a district court to enjoin speech that may be constitutionally protected without determining whether the conduct is in fact protected?

(b) Does § 10(*l*) violate Article III and the separation of powers doctrine by requiring a federal court to exercise its enforcement powers without making an independent judgment as to whether the exercise of the power is warranted?

(c) Does § 10(*l*) violate the Due Process Clause of the Fifth Amendment by requiring courts to interfere with labor unions' exercise of their liberty solely on the basis of the untested determination of a public prosecutor that such an interference is warranted?

STATUTORY PROVISIONS INVOLVED

Section 10(*l*) of the National Labor Relations Act, 29 U.S.C. § 160(*l*), provides in pertinent part as follows:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . .

STATEMENT OF THE CASE

Facts

On May 1, 1977 the employees of Hussman Refrigerator Company's Bridgeton, Missouri plant—represented by petitioner United Steelworkers of America, AFL-CIO-CLC ("USWA")—began a lawful economic strike.

Hussman is a wholly-owned subsidiary of respondent, Pet, Inc. Pet is a nationwide conglomerate engaged in the manufacture, distribution and sale of a wide variety of

products, e.g. Pet Milk, Whitman Chocolates, etc. Pet also operates chains of retail stores, including Stuckey's Restaurants and "9-0-5" Liquor Stores. Pet conducts its operations through "divisions," with each of its wholly-owned subsidiaries constituting an operating division. As to each, Pet receives the profits, maintains ultimate operating control, and lays down general managerial policies.

As part of its effort to secure a new contract for the striking employees at the Hussmann plant, USWA appealed for a consumer boycott of Pet products and stores. In newspaper advertisements and handbills, USWA truthfully informed the public of its dispute with Hussmann and of Hussmann's connection with Pet, and urged the public to assist the strikers by not purchasing Pet products or patronizing Pet retail outlets.

USWA's appeal was confined exclusively to newspaper advertisements and handbilling. There was no picketing. Those who engaged in handbilling wore ordinary clothing and carried no signs or other insignia. And instructions were issued to handbillers, which at all times were obeyed, that:

> No boycott material is to be distributed in the vicinity of a retail establishment owned by Pet, Inc. or selling Pet products.
>
> * * *
>
> No interference with entrance or exit of any person or workers under any circumstances.

The handbilling was carried out on street corners in downtown St. Louis, outside Busch Stadium at the end of a football game, and at other locations totally removed from Pet. The distribution was peaceful and orderly at all times. The literature did not urge any non-Hussman employees to refrain from working, and in fact no non-Hussmann employee stayed away from work.

Proceedings Below

On November 4, 1977, Pet filed unfair labor practice

charges with the National Labor Relations Board alleging that USWA was violating § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), by the advertising and handbilling described above. Four months later, the Board's Regional Director issued a complaint alleging that USWA was violating § 8(b)(4). In accordance with § 10(*l*) of the Act, 29 U.S.C. § 160(*l*), the Regional Director initiated this lawsuit seeking an injunction against the Union's conduct pending the Board's resolution of the § 8(b)(4) charge.

There was no dispute between the parties as to any material fact. After a period of discovery in the district court, the parties entered into a stipulation of facts, obviating the necessity for introducing any testimony. As the Court of Appeals later observed:

> Prior to and in the course of the submission of the case to the district court the facts and issues were developed about as fully as they would have been had this injunction suit never been filed and had the parties been contemplating an evidentiary hearing before an administrative law judge, with his decision being subject to review by the Board, and with the Board's determination being subject to appropriate consideration by this court in a direct action commenced herein. (App. 3a-4a).[1]

The dispute between the parties thus was entirely over questions of law. It was and is the Union's position that its conduct did not violate § 8(b)(4), and that if § 8(b)(4) were construed to invalidate such conduct the statute would contravene the First Amendment.

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[1] Indeed, with respect to the underlying § 8(b)(4) complaint, the parties have waived a hearing before an Administrative Law Judge and submitted the case directly to the Board for a decision, on virtually the same record as was before the district court and court of appeals on the 10(*l*) injunction. (App. 11a, n.2). The Board has not yet ruled.

The district court denied an injunction, concluding as follows:

> [T]he Court must conclude that upon the record presented herein, the Union's actions do not fall within the prohibitions of the Act. *Cf., National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46 (1964). Under such circumstances, the Court is unable to conclude that the Board has reasonable cause to believe that the Act was violated. The petition for the issuance of an injunction will therefore be denied. (App. 19a).

The district court did not reach the First Amendment question.

The Regional Director appealed, and the Court of Appeals for the Eighth Circuit reversed and remanded with directions that the district court issue the requested injunction unless the Union has ceased its conduct. The court below began by acknowledging:

> Were this an ordinary civil case in which the plaintiff sought either a preliminary or permanent injunction, we might have little difficulty in holding that the trial court did not err or abuse its discretion in denying injunctive relief. (App. 8a).

The court stated, however, that:

> [T]his is not an ordinary civil case, and the discretion of a district court in determining whether an injunction should issue in a § 10(a)(*l*) [sic] case is a limited one. (App. 8a).

The Court of Appeals did not disagree with the conclusion of the district court with respect to the lawfulness of the Union's conduct, but rather with the propriety of allowing entitlement to a § 10(*l*) injunction to turn upon resolution of the lawfulness of the conduct sought to be enjoined:

> [W]e are impelled to the conclusion that in holding that the conduct in question did not violate the Act and in denying the injunction on the basis of that holding the trial judge exceeded permissible limits of district court inquiry under § 10(a)(*l*) [sic]. (App. 10a).

In the view of the court below, an injunction "must issue" unless the court is convinced that "there is no reasonable basis upon which the NLRB [sic] would be able to sustain its charge before the Board" (*id.* 9a). Given this definition of its role, the court expressly declined to "pass upon" two legal propositions advanced by the union, either of which, if adopted, would be entirely dispositive of the lawfulness of the union's conduct, and both of which the court recognized to be "not insubstantial" (*id.* 11a, n. 3).

(1) The union argued that even if its conduct might otherwise fall within the prohibitory language of § 8(b)(4), it was expressly preserved from invalidity by the "publicity proviso" to § 8(b)(4).[2] That proviso, as construed by this Court, insulates from the sweep of § 8(b)(4) all "publicity, other than picketing" aimed at the customers of neutral employers provided that such publicity is truthful and does not result in refusals by employees of neutral employers to deliver or transport goods or to refuse to perform services. The protection of the proviso is no "narrower in coverage than the prohibition to which it is an exception." *Labor Board* v. *Servette*, 377 U.S. 46, 55 (1964). Subsequent to *Servette*, the lower courts and the Board consistently have ruled that truthful handbilling of neutral employers is protected by the proviso irrespective of the content of the message and/or the relationship between the primary and neutral employers.[3] (The Regional Direc-

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[2] The union also argued that, as a matter of law, its conduct did not violate the basic prohibitory language and thus would be lawful even if the statute contained no publicity proviso.

[3] E.g., *Great Western Broadcasting Corp.* v. *NLRB*, 356 F.2d 434 (9th Cir. 1966), enforcing 150 NLRB 467 (1964); *NLRB* v. *Upholsters Local 61*, 331 F.2d 561 (8th Cir. 1964); *Squillacote* v. *Building Construction Trade Council*, 266 F.Supp. 971, 976 (E.D. Wisc. 1967); *Operating Engineers Local 139*, 226 NLRB 759 (1976); *Meat Cutters, Local 248*, 230 NLRB No. 27 (1977); *Sheet Metal Workers Local No. 54*, 174 NLRB 362 (1969); *Chicago Typographical Union No. 16*, 151 NLRB 1666 (1965).

tor thus has issued a complaint which has no foundation in existing case law, and which is aimed at securing a reversal, or at least narrowing, of the Board's existing decisions; to date, the Board has never found truthful publicity unlawful, and has turned down repeated requests by the General Counsel and Regional Directors over the years to limit *Servette*.)

(2) The union argued that if § 8(b)(4) *did* declare unlawful the advertising and handbilling here—"pure speech" inviting members of the public to engage in lawful conduct—the statute would unconstitutionally infringe upon First Amendment rights.

By declaring that these contentions were "not insubstantial," yet declining to "pass upon" them, the Court of Appeals directed issuance of an injunction against conduct which it recognized might be lawful under controlling legal standards. The court believed that it was *required* to act in this manner by § 10(*l*). Because that construction of § 10(*l*) is in conflict with the construction applied in other circuits, on an issue of fundamental importance to the administration of the Act, the Union has filed this petition for writ of certiorari.[4]

[4] The precise terms of the Court of Appeals' mandate were that the district court was to issue the injunction sought by the Regional Director if the "conduct in question is still going on or is likely to be resumed." App. 11a. Although USWA was removed as exclusive bargaining agent in January 1979—the replacements for the strikers having voted not to be represented by USWA—the labor dispute continues. Striking employees are continuing their efforts to secure reinstatement to their jobs, and USWA is determined (unless enjoined) to continue its advertising and handbilling activity seeking a consumer boycott of Pet in aid of the striking employees. The Union requested that the Court of Appeals stay its mandate pending the filing of this petition for writ of certiorari and this Court's disposition of that petition, but the Court of Appeals denied the stay. The Union applied to this Court for a stay of execution of the mandate pending consideration of a petition for writ of certiorari, but that application was denied, initially by Justice Blackmun and later by the full court (No. A-835, October Term, 1978).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Turns Upon An Interpretation of § 10(*l*) As To Which There Is A Direct Conflict Among the Circuits—Whether the Courts Are Required To Issue Injunctions Against Conduct They Believe To Be Lawful. In View of the Frequency of § 10(*l*) Injunction Requests, and the Critical Role Such Injunctions Play in Affecting the Outcome of Labor Disputes, It is Vital that This Court Resolve the Conflict.

Section 10(*l*) of the National Labor Relations Act prescribes unique rules governing the availability of preliminary relief when it is charged that the Act is being violated by secondary boycotts (§ 8(b)(4)), hot cargo agreements (§ 8(e)), or recognitional picketing (§ 8(b)(7)). The NLRB's regional offices must provide expedited investigation of such charges, and whenever following such investigation a Regional Director "has reasonable cause to believe such charge is true and that a complaint should issue" he *must*—"he shall"—petition the appropriate federal district court "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter."

While the statute imposes a mandatory duty upon Regional Directors to *seek* such relief, it does not, of course, impose a mandatory duty upon the district courts to grant it. Rather, the function of the district court is defined in the following sentence of § 10(*l*):

> Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law.[5]

[5] The formulation "jurisdiction . . . notwithstanding any other provision of law" is designed to make clear that § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, which generally deprives the federal courts of "jurisdiction" to issue injunctions in labor disputes, is not to be applicable to petitions under § 10(*l*).

Although § 10(*l*) was enacted more than 30 years ago, and § 10(*l*) petitions are filed by the hundreds each year,[6] this Court has never defined the standard which the federal district courts are to apply in determining whether injunctive relief is "just and proper" in a § 10(*l*) case, and the courts of appeals are in open and acknowledged conflict as to the controlling standard.

In many § 10(*l*) cases, as here, there is no dispute as to the facts, but the Union insists that its admitted conduct is perfectly lawful. The courts of appeals are sharply divided over the role they are to play in determining whether a § 10(*l*) injunction should issue in these circumstances.

The Third, Fifth, Seventh, Eighth, and Ninth Circuits have held that the district court should inquire into the merits no further than to determine that the legal theory upon which the Regional Director's reasonable cause finding is based is not "insubstantial and frivolous." As the Third Circuit has put it:

> If the district court can characterize the theory as insubstantial and frivolous, it may refuse the injunction. If the Board's theory cannot be so characterized, however, the district court must grant the injunction. . .

Samoff v. *Building & Const. Tr. Council of Philadelphia*, 475 F.2d 203, 207 (3rd Cir. 1973), vacated on other grounds, 414 U.S. 808 (1973). Accord: *Boire* v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189 (5th Cir. 1975); *Squillacote* v. *Graphic Arts Intern. Union, AFL-CIO*, 540 F.2d 853, 858 (7th Cir. 1976); *Hendrix* v. *Operating Engineers, Local 671*, —— F.2d ——, 100 LRRM 2704, 2708 (8th Cir. 1979); *Kennedy* v. *Los Angeles Typographical Union*, 418 F.2d 6, 8 (9th Cir. 1969).[7] To these courts, an injunction is man-

[6] For example, in fiscal years 1973, 1975 and 1976, respectively, the number of § 10(*l*) petitions filed was 242, 316 and 173. NLRB Annual Reports, 1973 (p. 169), 1975 (p. 167), 1976 (p. 173).

[7] There are additional decisions from each of these Circuits to the same effect, some of which are cited in the opinions cited in text.

datory even though the court believes that the Regional Director's legal theory is incorrect and, if adopted by the Board in its decision on the merits, would not be sustained on review, *i.e.* even though the court believes the union's conduct to be lawful. See, *e.g.*, *Samoff*, 475 F.2d at 207.

The Second and Fourth Circuits have expressly disagreed with the above five Circuits as to the proper standard. *Danielson* v. *Joint Bd. of Coat, Suit & Allied Gar. Wkrs. U.*, 494 F.2d 1230, 1239-45 (2d Cir. 1974) Friendly, J.); *Humphrey* v. *Intern. Longshoremen's Assn., AFL-CIO*, 548 F.2d 494, 497-498 (4th Cir. 1977). The Second and Fourth Circuits have construed § 10(*l*) to mean that, after according appropriate deference to the Board official's argument in support of his legal theory, if

> the district court is convinced that the General Counsel's legal position is wrong . . . it should not issue an injunction under § 10(*l*).

Danielson, 494 F.2d at 1245.

Judge Friendly, whose opinion in *Danielson* was adopted by the Fourth Circuit in *Humphrey*, 548 F.2d at 497-498, arrived at this conclusion in a context identical to that of the instant case: the facts were not disputed but the union challenged the validity of the Regional Director's contention that the union's conduct amounted to a violation of the substantive prohibitions of the Act. Judge Friendly first addressed the underlying merits, and concluded that were the Board ultimately to find a violation "the order would not be enforced unless some new facts or legal theories should appear," 494 F.2d 1239. The issue thus posed was whether § 10(*l*) requires a court to issue an injuncton "despite its conviction that, on what has been presented to it, the court would not enforce an order finding an unfair labor practice," *id.* at 1241. Judge Friendly extensively reviewed the legislative history of § 10(*l*), and drew this conclusion:

> When Congress enacted § 10(*l*), it was thinking primarily of the run of the mine cases where the law was

> relatively plain although the facts might be in serious dispute, not of a new adventure of the General Counsel in the interpretation of a statute fourteen years after it had come on the books. In such a case it is more realistic to regard the status quo as what everyone had assumed it to be until General Counsel evolved his new theory, rather than this employer's position the moment before the pickets appeared. When that occurs, we think Congress would have wished the courts to perform their traditional role rather than enjoin conduct which they consider clearly lawful even for the interval before the Board has determined whether an unfair labor practice has occurred and has sought enforcement of an order finding that it has. Although the Board has thus far processed the unfair labor practice charge in the instant case with commendable speed, this has not always been true. In any event it runs too much against the judicial grain to enjoin conduct which a court regards as lawful for us to sanction such an injunction without clearer evidence that this is what Congress wanted. *While we naturally regret our inability to join with other courts of appeals that have read the statute differently, we must follow our own star.* (494 F.2d at 1245; emphasis added).

In the instant case, the Eighth Circuit, although not employing the same words, adhered in substance to the construction of 10(*l*) which requires issuance of an injunction unless the Regional Director's legal theory is "insubstantial and frivolous." The opinion below cites the seminal Third Circuit decision articulating the "insubstantial and frivolous" standard, *Schauffler* v. *Local 1291, International Longshoremen's Association,* 292 F.2d 182, 187-188 (3rd Cir. 1961), as well as the Eighth Circuit's own prior decision in *Local Joint Board, Hotel & Restaurant Emp.* v. *Sperry,* 323 F.2d 75, 77 (8th Cir. 1963) which quoted and followed *Schauffler* (App. 9a). And in the same month as the decision below issued, the Eighth Circuit issued another decision expressly reaffirming its allegiance to the "insubstantial and frivolous" test. *Hendrix, supra,* 100 LRRM at 2708.

Plainly, the court below did *not* apply the standard enunciated in the Second and Fourth Circuit's decisions. The district court *did* apply that standard: it denied an injunction because it concluded that on the undisputed facts the union had not violated § 8(b)(4). The court below did not reverse because it disagreed with this construction of § 8(b)(4); indeed, it declared that were that a relevant issue in the § 10(*l*) proceeding "we might have little difficulty in holding that the trial court did not err" in denying an injunction (App. 8a). Rather, the court below reversed because:

> [I]n holding that the conduct in question did not violate the Act and in denying the injunction on the basis of that holding the trial judge exceeded permissible limits of district court inquiry under § 10(a)(*l*) [sic]. (App-10a).

The district court thus was reversed precisely because it did what the decisions of the Second and Fourth Circuits require.

The question on which the circuits are in conflict was critical to the decision below. Had the court below agreed with the Second and Fourth Circuits, it would at least have had to reach and decide the issues which it expressly refused to "pass upon," and upon doing so almost certainly would have affirmed the denial of an injunction (see pp. 7-8 *supra,* and pp. 15-16, n. 8, ***infra***).

Resolution by this Court of the conflict among the circuits is vital. Sections 8(b)(4), 8(e) and 8(b)(7)—the substantive provisions whose alleged violation compels the filing of a § 10(*l*) petition—regulate areas of extraordinary sensitivity: the economic weapons available to unions and employees in lawful labor disputes. Each time an NLRB Regional Director decides to test out a novel legal theory concerning those sections he must not only issue a complaint, but also seek a § 10(*l*) injunction; thus the interpretation of § 10(*l*) adopted by the court below and by several other circuits puts unions in jeopardy that they will be deprived of critical

economic weapons in ongoing labor disputes even when controlling legal decisions indicate that their conduct is lawful. In view of the volume of § 10(*l*) petitions filed, the importance that § 10(*l*) be properly construed, the dimensions of the conflict among the circuits, and the intractability of that conflict with respect to a statute which has been on the books for more than three decades, this Court should grant certiorari and define the proper standard to be applied by the courts in deciding § 10(*l*) cases.

II. There Is An Important Unresolved Question Whether § 10(*l*) Requires Courts To Issue Injunctions Without Resolving Substantial Claims That the Conduct To Be Enjoined Is Protected By the First Amendment.

Even if the "insubstantial and frivolous" standard were held to be the appropriate one for assessing the Regional Director's interpretation of § 8(b)(4), there is a separate question whether § 10(*l*) requires that courts must similarly defer to the Regional Director's views as to the meaning of the First Amendment. Because § 10(*l*) might well be unconstitutional if it required courts to issue injunctions without passing upon admittedly substantial claims that the conduct sought to be enjoined is protected by the First Amendment (see pp. 15-16, *infra*), there is an important threshold question of statutory interpretation: whether, as the court below has ruled, Congress intended to pretermit consideration of First Amendment issues in § 10(*l*) cases. Efforts to apply §§ 8(b)(4) and (7) to "pure speech", and speech-related activities, are not uncommon, cf. *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58 (1964), and this issue is thus likely to be a recurring one.

III. The Decision Below Construes § 10(*l*) in A Manner Which Raises Serious Questions As to the Constitutionality of § 10(*l*)—Indeed, Which Renders § 10(*l*) Unconstitutional Under Controlling Decisions of This Court.

As explained in Parts I and II, the court below (along

with a number of other circuits) has read § 10(*l*) to preclude district courts, in passing on § 10(*l*) applications, from examining the merits of a union's legal defenses—including its First Amendment defenses—to the § 10(*l*) application. For this reason, the court of appeals, without passing on the union's "not insubstantial" claims that its publicity campaign was protected by the First Amendment and by the publicity proviso to § 8(b)(4), believe that the district court was required to enjoin the union's publicity campaign here. If the court of appeals has correctly interpreted § 10(*l*), then that statute raises grave constitutional questions that warrant review by this Court.

1. As the instant case illustrates, § 10 (*l*) applications can raise thorny First Amendment issues, pitting the First Amendment interests of labor unions and their members in urging support for the union in a labor dispute against governmental power to regulate the use of economic weapons. The scope of the protection that the First Amendment provides to pure speech and to expressive activity in the context of labor disputes is not fully settled.[8] But while the *substantive* First Amendment rights of unions and their members in labor disputes is subject to question, there is no room to doubt that the First Amendment prohibits a

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[8] In *Electrical Workers* v. *NLRB*, 341 U.S. 694 (1951), the Court held that § 8(b)(4) could constitutionally proscribe picketing and related speech "in furtherance of . . . unlawful objectives," *viz* a secondary boycott, "[t]he substantive evil condemned by Congress in § 8(b)(4)." *Id.* at 705. But the Court has never addressed the scope of Government power to proscribe a labor union from speaking to consumers urging consumers to do what they have a perfect right to do—decline to patronize a particular employer's business. Indeed in *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58 (1964), the Court recognized that serious First Amendment questions would be posed were § 8(b)(4) to reach such speech, but, because of the construction of the statute adopted in that case, found it unnecessary to resolve those questions

court from enjoining indefinitely conduct that may be privileged by the First Amendment without first adjudicating whether the activity is, in fact, so privileged. This is the clear teaching of the line of cases in which the Court has invalidated statutory schemes which provided for restraints on speech but which did not establish "procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975); *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *Carroll* v. *President & Commissioners*, 393 U.S. 175 (1968); *Blount* v. *Rizzi*, 400 U.S. 410 (1971). As construed below, § 10(*l*) is such a statute: it requires injunctions of even pure speech while precluding judicial determination of whether such injunctions violate the First Amendment. If this construction is correct, a serious question arises as to whether § 10(*l*) violates the First Amendment.

2. The construction of § 10(*l*) adopted below also poses an important Article III/separation of powers question. The Court has recognized that, in the words of Professor Hart in his renowned Dialogue,[9] if Congress directs an Article III court to decide a case, Article III imposes "a limitation on the power of Congress to tell the court *how* to decide it." Thus, for example, in *Crowell* v. *Benson*, 285 U.S. 22 (1932), the Court held that before an Article III court can enforce a final order of an administrative agency, a certain measure of independent judicial review of the basis for the order is constitutionally required. This case thus presents a fundamental Article III question: Whether Congress can compel Article III courts to issue injunctions against private conduct at the request of administrative officers, even where the courts would find upon independent examination that that conduct is protected by statute and/or the Constitution, and where, therefore, the courts would be powerless to prevent the use of their processes to inflict a statutory or constitutional wrong.[10]

[9] Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

Assuming that the Court were to find that the court of appeals properly construed § 10(*l*), the constitutional issues posed by that construction would warrant review by this Court.[11] The questions are, in their own right, important issues of constitutional law. Moreover, the questions have enormous practical significance, for, if the court below correctly construed § 10(*l*), the resolution of these constitutional questions will determine the scope of judicial review of § 10(*l*) applications, and thus the availability to labor unions of critical economic weapons in lawful labor disputes.

[10] It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. . . . [W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process.

Yakus v. *United States*, 321 U.S. 414, 468 (1944) (Rutldege, J., dissenting).

[11] In addition to the Article III issues, an important Due Process question is posed by § 10 (*l*), if, as the court below held, it requires district courts to interfere with the liberty of labor unions and their members based solely on the untested determination of a public prosecutor that such interference is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 78-1411

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF REGION 14 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
Appellant,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Submitted: December 13, 1978
Filed: February 22, 1979

Before GIBSON, Chief Judge, and BRIGHT and HENLEY, Circuit Judges.

HENLEY, Circuit Judge.

This is an appeal by the Regional Director (Director) of the Fourteenth Region of the National Labor Relations Board from an order of the United States District Court for the Eastern District of Missouri (The Honorable John F. Nangle, District Judge) dismissing a petition for an injunction that had been filed by the Director on behalf of the Board pursuant to the provisions of § 10(a)(*l*) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(a)(*l*). The defendant in the case, appellee here, was the United

Steelworkers of America, a national labor organization and hereinafter called the Union or the Steelworkers.

We reverse and remand.

Hussmann Refrigerator Company (Hussmann), a Delaware corporation authorized to do business in Missouri, is a wholly owned subsidiary of Pet, Incorporated (Pet), and Hussmann maintains and operates a number of facilities for the manufacture, distribution and sale of refrigeration equipment and other items of merchandise such as shelving for retail stores and check-out counters for operations such as grocery stores and supermarkets. For a number of years prior to May, 1977 Hussmann employees had been represented for collective bargaining purposes by Local 13889 of the Steelworkers. A collective bargaining agreement between Hussmann and the Steelworkers that had gone into effect in 1974 expired on May 1, 1977. The parties had not been able to agree on a new contract, and when the old one expired the Union struck the Hussmann plant located at Bridgeton, St. Louis County, Missouri.

After the strike had gone on for some time, Hussmann permanently replaced the strikers with other employees, an action that naturally was not pleasing to the Union. On October 21, 1977 Lloyd McBride, the International President of the Steelworkers, held a televised news conference in St. Louis and announced that the Union was calling for a nationwide consumer boycott of Pet, its operating divisions, and products sold by Pet.

This call for a consumer boycott was implemented by some newspaper advertisements inserted in papers having a general circulation in the Greater St. Louis area and by the circulation of handbills by Union members and sympathizers urging consumers not to patronize certain identified businesses owned by Pet and not to purchase certain identified Pet products.

The immediate controversy between Hussmann and the

Union was accompanied by Union picketing of the Bridgeton plant of Hussmann and of certain other Hussmann facilities. However, the distribution of handbills in connection with the Union's consumer boycott effort did not involve the picketing of any business or establishment; nor did it involve any threatening or disorderly conduct. The handbills appear to have been written and distributed in strict accordance with ground rules prepared by the Union and its counsel with the end in view of avoiding a successful charge by Pet and its subsidiaries of a "secondary boycott" made unlawful by § 8(a)(b)(4)(ii)(B) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(ii)(B).

The instant case had its genesis in the fact that in November, 1977 Pet in fact filed with the National Labor Relations Board an unfair labor practice complaint against the Union charging an unlawful secondary boycott. The charge was amended twice with the second amendment being filed on March 1, 1978. The Board, after some preliminary investigation, assumed jurisdiction of the case, and on March 10, 1978 commenced this action praying for the issuance of an injunction against the Union until the unfair labor practice charge filed by Pet should be decided by the Board. The petition alleged that there was reasonable cause to believe that the unfair labor practice alleged in the second amendment to the charge had in fact been committed.

The Union resisted the petition in the district court on three grounds: (1) that the conduct of the Union of which Pet complained did not constitute an unlawful secondary boycott; (2) that the conduct in question was protected by the publicity proviso appearing in § 8(b)(4) of the Act; and (3) that a holding that the conduct in question constituted a violation of the Act would involve a violation of the right of free speech guaranteed by the first amendment to the Constitution of the United States.

Prior to and in the course of the submission of the case to the district court the facts and issues were developed about

as fully as they would have been had this injunction suit never been filed and had the parties been contemplating an evidentiary hearing before an administrative law judge, with his decision being subject to review by the Board, and with the Board's determination being subject to appropriate consideration by this court in a direct action commenced herein. Most of the significant facts were set out in stipulations that were filed in the district court.

The case was submitted to the district court on the complete record plus briefs and oral argument. In May, 1978 the district court filed its memorandum opinion setting out its findings of fact and conclusions of law and entered its order dismissing the Director's petition. Notice of appeal was timely filed.

Before going further we deem it well to refer to the pertinent provisions of the Act.

Section 8(b) defines unfair labor practices of which labor organizations or their agents may be guilty and prohibits those practices. The "secondary boycott" prohibition, invoked by Pet, appears as § 8(b)(4)(ii)(B). That subsection makes it unlawful for a labor organization to threaten, coerce or restrain any person "engaged in [interstate] commerce or in an industry affecting commerce" where, in either case, the object of the conduct is:

> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing....

That prohibition, however, is subject to certain provisos, including the following:

> That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution....

Insofar as here relevant, § 10(a)(*l*) of the Act is as follows:

> (*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law....

Significant facts in the case are not in serious dispute and may be summarized as follows.

Pet is a Delaware corporation that has its principal executive offices in the City of St. Louis. It is a huge, nationwide business conglomerate that manufactures, distributes and sells a wide variety of products falling into a number of distinct categories. Pet's operating arms are organized into a number of "groups" with each group containing several "divisions." As far as day to day operations are concerned, the individual divisions have a good deal of autonomy, although it is clear that ultimate control is vested in Pet and that Pet lays down general policies applicable to all divisions. Profits earned by a particular division inure to Pet's benefit, and losses sustained by a particular division must ultimately be borne by Pet.[1]

As stated, Hussmann is a wholly owned subsidiary of Pet and is a division of the so-called "Hussmann Group." Hussmann was established in the mid-1960's with moneys advanced by Pet amounting to fifty million dollars. The advance was not evidenced by any note or secured by any mortgage; the obligation bore no interest and there was no fixed schedule of repayment. As of the end of March, 1978 Hussmann was indebted to Pet in the sum of approximately sixteen million dollars.

There is no question that Hussmann is engaged in interstate commerce or that it is an industry the activities of which affect interstate commerce. Its volume of business is large and it employs numerous people. It is, in other words, an employer which is subject to the jurisdiction of the Board. Through the years Hussmann has had direct or indirect dealings with other Pet divisions.

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[1] No useful purpose would be served by listing all of the enterprises operated by Pet or all of the products sold by Pet. We will mention the fact that Pet owns and controls the familiar chain of roadside restaurants known as "Stuckey's," and that it also owns the chain of retail liquor stores known as "9-0-5." Included among products sold by Pet are "Pet Milk" and "Whitman's Chocolates."

While the consumer boycott called for by the Union was described as "nationwide," it appears to us that attempted implementation of the call was limited to the City of St. Louis, to St. Louis County, and to areas in western Illinois where many persons who work in and around St. Louis reside.

The newspaper advertisements employed by the Union and the handbills that were distributed contained brief and generally accurate descriptions of the controversy between the Union and Hussmann. Consumers were urged not to patronize "Stuckey's" or the "9-0-5" stores, and not to buy a number of specifically identified Pet products.

In his opinion the trial judge found the facts substantially as we have set them out, and then proceeded to state his conclusions of law.

At the outset of its discussion the district court recognized that its function in a § 10(a)(*l*) proceeding was not to determine whether an unfair labor practice had in fact been committed, but simply to determine whether there was reasonable cause to believe that a violation of the Act had occurred, and, if so, whether an injunction should issue for the purpose of preventing a frustration of Congressional policy in the field of labor relations, and the court cited our holding in *Wilson* v. *Milk Drivers & Dairy Employees Union, Local 471*, 491 F.2d 200, 203 (8th Cir. 1974).

Proceeding, the trial judge after quoting relevant statutory provisions went on to say:

> The facts adduced herein establish that respondent Union engaged in handbilling and advertising only. There was no picketing involved, nor was any of the handbilling accomplished at or near a facility owned by Pet, Inc. or selling Pet products. Due to the relationship between Pet and its subsidiaries, it is obvious that the Union sought a consumer boycott in order to exert the maximum economic pressure possible upon Hussmann to end its dispute with the Union. There is no evidence

in this record of any threat or coercion directed at any individual engaged in commerce or in an industry affecting commerce. Certainly, a consumer does not fall within such a definition. If Pet and its subsidiaries are viewed as the individuals engaged in commerce at whom the threats or coercion are supposedly directed, the record is devoid of any evidence that the Union forced or required any person to cease using or otherwise dealing in Pet products. The locations of the handbill distributions, away from any facility owned by Pet, Inc. or selling Pet products, totally negates any inference that the Union sought to force, coerce or restrain individuals. There is absolutely no evidence from which to conclude or even infer that respondent had as its object the forcing of any employer to cease doing business with Hussmann.

Accordingly, the Court must conclude that upon the record presented herein, the Union's actions do not fall within the prohibitions of the Act. *Cf., National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46 (1964). Under such circumstances, the Court is unable to conclude that the Board has reasonable cause to believe that the Act was violated. The petition for the issuance of an injunction will therefore be denied.

Were this an ordinary civil case in which the plaintiff sought either a preliminary or a permanent injunction, we might have little difficulty in holding that the trial court did not err or abuse its discretion in denying injunctive relief.

However, as the district court itself recognized, this is not an ordinary civil case, and the discretion of a district court in determining whether an injunction should issue in a § 10 (a)(*l*) case is a limited one. The governing standard in this circuit was laid down in the recent case of *Hendrix* v. *Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Dist. Local 340*, 555 F.2d 175 (8th Cir. 1977), and cases cited. In the *Hendrix* case the controversy was as to whether certain union picketing was "organizational" or whether it was merely "informational." We said, 555 F.2d at 178:

Upon this basic set of facts the NLRB claims that the picketing was organizational in character and the union claims it was only informational. For the purposes of this appeal we do not need to decide which interpretation is correct and we specifically do *not* express an opinion thereon. Our only duty in assessing a request for injunctive relief is set forth in *Wilson* v. *Milk Drivers & Dairy Employees Local 471*, 491 F.2d 200, 203 (8th Cir. 1974).

> In proceedings under section 10(*l*) of the Act the district court is not called upon to decide whether, in fact, a violation has occurred. The determination of this question is reserved exclusively for the Board with review by the Court of Appeals under section 10(e) and (f) of the Act. The inquiry of the district court is limited to a determination of whether the Board had reasonable cause to believe the Act was being violated as charged, and if it so concludes, it must grant such relief as it deems just and proper. *Local Joint Board Hotel & Restaurant Employees etc.* v. *Sperry* (8th Cir. 1963), 323 F.2d 75, 77; *Schauffler* v. *Local 1291, International Longshoremen's Association* (3d Cir., 1961), 292 F.2d 182, 187-188.
>
> The statutory standard of "reasonable cause" is satisfied if there is a showing of factual issues which must be resolved by the Board. Section 10(*l*) commands the courts to disregard their traditional reluctance to issue preliminary injunctions when there is a substantial conflict in the evidence. *Kennedy* v. *Sheet Metal Workers Int. Assn. Local 108* (D.C.C.D.Cal., 1968), 289 F.Supp. 65, 91. *See also, Local Joint Board* v. *Sperry, supra*, 323 F.2d at 77-78; *Douds* v. *Milk Drivers & Dairy Employees Union* (2d Cir., 1957), 248 F.2d 534, 537.

In this case, as in *Dawidoff* v. *Minneapolis Building & Construction Trades Council*, 550 F.2d 407 (8th Cir. 1977), we cannot say, based on this record, that there is no reasonable basis upon which the NLRB would be able to sustain its charge before the Board. For that reason the injunction must issue to permit the Board a reasonable time to make the initial determination which Congress has entrusted it to make.

The instant case may be a somewhat unusual labor case in that while many facts are undisputed the conduct of the Union cannot readily be characterized as being or as not being a "secondary boycott" generally prohibited by § 8(b)(4)(ii)(B) but perhaps protected by the "publicity" proviso of the Act or by the first amendment to the Constitution.

We are concerned with contentions that the Union's appeals for a consumer boycott of Pet's divisions and their products in support of the Union's dispute at the Bridgeton plant unlawfully restrained and coerced Pet and its divisions. We are concerned with the question whether the boycott was pursued unlawfully for the object of causing Pet's divisions to cease doing business with their customers, suppliers and distributors and to cause their customers, suppliers and distributors to cease doing business with Pet and its divisions. In these areas especially, we are impelled to the conclusion that in holding that the conduct in question did not violate the Act and in denying the injunction on the basis of that holding the trial judge exceeded permissible limits of district court inquiry under § 10(a)(*l*).

Upon the record now before us, we are convinced that there was reasonable cause to believe that a violation of the Act had occurred. Accordingly, the judgment of the district court must be reversed and the cause remanded with directions.

The fact that we hold that the judgment of the trial court is to be reversed and the cause remanded does not mean that the Director is entitled to an injunction of indefinite duration while the Board ponders the issue or issues raised by Pet's unfair labor practice charge as amended. Again, *Hendrix, supra,* is instructive. We said, 555 F.2d at 178:

> At the hearing before this court the attorney for the NLRB indicated that, assuming cooperation of both parties, a final decision of the Board could reasonably be possible by August 1, 1977. Accordingly, we direct

> the district court to grant an injunction, as requested by the NLRB, which will expire on August 1, 1977, unless by that date the Board has issued its decision upholding the position now taken by the NLRB. *See Dawidoff* v. *Minneapolis Building & Construction Trades Council, supra,* 550 F.2d at 412-414. If such a decision is issued, the union may request this court to review the decision at the September term of this court.

In the course of the remand the district court should determine whether and to what extent the Union conduct complained of is being continued or is likely to be resumed and the status of the proceeding before the Board.[2] If it appears to the district court that the conduct in question is still going on or is likely to be resumed and if the Board's ruling on the issues before it is not to be expected immediately, an injunction should issue as prayed for by the Director.[3] We leave the question of the duration of the injunction in the first instance to the discretion of the district court. In any event, if it appears that agency action is being unreasonably delayed, the Union may apply under Fed. R. Civ. P. 60(b) for a modification of the terms of or dissolution of the injunction.

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[2] In the Union's brief it is stated that after Judge Nangle denied the Director's application for an injunction, the parties waived a hearing before an administrative law judge and submitted the case to the Board on an agreed record. We think it probable that that record was about the same record made before the district court in this case, although we do not know.

[3] The claims of the Union based on the first amendment to the Constitution and on the "publicity proviso" appearing in § 8(b)(4) of the Act are not insubstantial, and the question of their validity must at some stage of this controversy be decided. The district court did not pass upon that question, nor do we pass upon it at this essentially preliminary stage of the unfair labor practice proceeding. The Board should consider the claims in question, and its determinations with respect to them will be subject to review here if any direct proceeding is commenced in this court as provided by § 10(e) or § 10(f) of the Act.

Reversed and remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

September Term, 1978

No. 78-1411

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF REGION 14 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
Appellant,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Motion of appellee for stay of mandate pending application for certiorari having been filed in the above case and considered by the Court it is now here ordered that the motion be, and it is hereby, denied.

March 14, 1979

APPENDIX C

United States District Court

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-277 C (3)

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF REGION 14 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Respondent.

MEMORANDUM

This matter is before the Court upon the petition of Joseph H. Solien, Regional Director of Region 14 of the National Labor Relations Board for injunctive relief pursuant to 29 U.S.C. § 160(*l*) pending final disposition of a charge pending before the National Labor Relations Board.

The matter was submitted to the Court upon stipulations of the parties, oral arguments and briefs. Based thereon, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Respondent United Steelworkers of America, AFL-CIO-CLC [hereinafter "Union"] represents for purpose of collective bargaining the employees of Hussmann Refrigerator Company at Hussmann's facility at Bridgeton, Missouri. Said employees have been on strike since May 1, 1977 and have picketed other Hussmann facilities from time to time since that date. Hussmann is a wholly-owned subsidiary of Pet, producing commercial refrigeration equipment, parts for such equipment, display cases, shelving, check-out counters, and other equipment and fixtures.

2. On October 21, 1977, the president of respondent Union held a press conference and stated in part:

> . . . I am today announcing the start of a national boycott by our 1.4 million member union of Pet Inc. food products, their retail store outlets and commercial refrigeration equipment.

Pursuant to the boycott, respondent Union placed advertisements in area newspapers which advised that members of the Union had been on strike at Hussmann's facility in Bridgeton, Missouri; that Hussmann is a part of Pet, Inc., and that the Union requested public support in boycotting "all retail stores owned by Pet, Inc. and . . . and product produced by Pet, Inc. and its subsidiaries." The advertisement also listed retail stores and products at which the boycott was directed. From fiscal year 1975 to the present, various Pet subsidiaries have purchased products from Hussmann and its subsidiaries. Numerous Pet subsidiaries, however, have not purchased any products from Hussmann but are still objects of the Union's boycott activities.

3. Handbills were printed which essentially stated the same information. These handbills were distributed in the vicinity of Affiliated Hospital Products, Inc., a plant whose employees are represented for purposes of collective bargaining by respondent Union; on street corners in downtown St. Louis but not at the entrance to any building or establishment; at the end of a football game at Busch Memorial Stadium in the City of St. Louis; in a residential section of O'Fallon, Illinois; on a street in University City, Missouri; and on Manchester Avenue in the City of St. Louis. Petitioner does not contend that the advertisements or handbills were misleading or untruthful.

4. The handbill distributors wore ordinary clothing and

carried no signs or other insignia. There was no picketing or patrolling in conjunction with the distribution of handbills. The distribution was peaceful and orderly at all times.

5. On no occasion did the handbilling or advertisements have the effect of inducing any individual employed by any person other than Hussmann to refuse, in the course of his employment, to pick up, deliver, or transport any goods, or not to perform any services.

6. Respondent Union issued boycott instructions which provided in part:

> 1. *No* boycott material is to be distributed in the vicinity of a retail establishment owned by Pet, Inc. or selling Pet products.
>
> . . .
>
> 3. No interference with entrance or exit of any person or workers under any circumstances.

The handbilling activity at all times conformed with these instructions. Neither petitioner nor respondent has received any complaint regarding the conduct of persons engaged in distributing respondent's handbills.

7. On or about November 4, 1977, Pet, Inc. filed charges with the National Labor Relations Board alleging that respondent Union was engaging in unfair labor practices within the meaning of § 8(b)(4) of the National Labor Relations Act.

8. In the middle 1960's Pet transferred in excess of $50 million to Hussmann who used this money to purchase land and construct its facility in Bridgeton, Missouri, and for operating capital. There are no notes or other documents evidencing this original transfer of capital except for accounting entries. No security was given by Hussmann to Pet. No interest has been or will be paid by Hussmann. There is no specific repayment schedule. As of March 31, 1978, the balance due is approximately $16 million.

9. The president of Hussmann was appointed to the position by the Chairman of the Board, President and Chief Executive Officer of Pet, with the approval of the Board of Directors of Pet. Various officers of Hussmann are not in fact operating officers but are employees of Pet, listed as officers of Hussmann for state reporting purposes. The Board of Directors of Hussmann are selected for tax or financial purposes; they are not selected for operational purposes. The members of the Board of Directors perform no service and receive no compensation in their capacity as Directors. This applies to the Board of Directors of other Pet subsidiaries as well.

10. All profits and losses of Hussmann flow to Pet and are ultimately reflected in the financial statements of Pet. The tax policies and procedures of all Pet subsidiaries and divisions are centrally controlled by Pet. All accounting policies are centrally established by Pet. Pet has established and maintains national accounts, the purpose of which is to enable its subsidiaries and divisions to obtain discounted prices by pooling their purchasing power. Pet centrally administers some benefit programs for salaried employees and executives of all of its various subsidiaries and divisions, but some subsidiaries and divisions maintain and administer additional benefit programs for their salaried employees and executives.

CONCLUSIONS OF LAW

This Court has jurisdiction of the subject matter and the parties to this proceeding in accordance with 29 U.S.C. § 160(l):

> In proceedings under section 10(1) of the Act the district court is not called upon to decide whether, in fact, a violation has occurred. The determination of this question is reserved exclusively for the Board . . . the inquiry of the district court is limited to a determination of whether the Board had reasonable cause to believe the Act was being violated as charged, and if it

so concludes, it must grant such relief as it deems just and proper.

...

The propriety of injunctive relief does not depend upon traditional equitable principles, but whether it is necessary to effectuate policy as announced by Congress. It is just and proper when the circumstances of a case create a reasonable apprehension that the statutory remedial purposes will be frustrated in the absence of such relief. *Wilson* v. *Milk Drivers & Dairy Employees Union, Local 741*, 491 F.2d 200, 203 (8th Cir. 1974).

The charge presently pending before the Board alleges a violation of § 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4) which provides in relevant part:

It shall be an unfair labor practice for a labor organization or its agents—

...

(4) ... (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where ... an object thereof is—

...

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer or to cease doing business with any other person ... *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

...

... *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport

any goods, or not to perform any services, at the establishment of the employer engaged in such distribution ...

The facts adduced herein establish that respondent Union engaged in handbilling and advertising only. There was no picketing involved, nor was any of the handbilling accomplished at or near a facility owned by Pet, Inc. or selling Pet products. Due to the relationship between Pet and its subsidiaries, it is obvious that the Union sought a consumer boycott in order to exert the maximum economic pressure possible upon Hussmann to end its dispute with the Union. There is no evidence in this record of any threat or coercion directed at any individual engaged in commerce or in an industry affecting commerce. Certainly, a consumer does not fall within such a definition. If Pet and its subsidiaries are viewed as the individuals engaged in commerce at whom the threats or coercion are supposedly directed, the record is devoid of any evidence that the Union forced or required any person to cease using or otherwise dealing in Pet products. The locations of the handbill distributions, away from any facility owned by Pet, Inc. or selling Pet products, totally negates any inference that the Union sought to force, coerce or restrain individuals. There is absolutely no evidence from which to conclude or even infer that respondent had as its object the forcing of any employer to cease doing business with Hussmann.

Accordingly, the Court must conclude that upon the record presented herein, the Union's actions do not fall within the prohibitions of the Act. *Cf., National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46 (1964). Under such circumstances, the Court is unable to conclude that the Board has reasonable cause to believe that the Act was violated. The petition for the issuance of an injunction will therefore be denied.

JOHN F. NANGLE
United States District Court

Dated: May 8, 1978.

APPENDIX D

United States District Court

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-277 C (3)

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF REGION 14 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Respondent.

ORDER

Pursuant to the memorandum filed this date,

IT IS HEREBY ORDERED that the petition of Joseph H. Solien for injunctive relief pursuant to 29 U.S.C. § 160(l) be and is denied and that this cause be and is dismissed.

JOHN F. NANGLE
United States District Judge

Dated: May 8, 1978.

Supreme Court, U. S.
FILED
JUN 14 1979
MICHAEL RODAK, JR., CLERK

No. 78-1634

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, PETITIONER

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF REGION 14
OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Argument	7
Conclusion	15
Appendix	1a

CITATIONS

Cases:

American Federation of Television & Radio Artists, Washington-Baltimore Local, AFL-CIO (Baltimore News American Division, Hearst Corporation), 185 N.L.R.B. 593, enforced, 462 F. 2d 887	11-12
Bachman Machine Co. v. *National Labor Relations Board*, 266 F. 2d 599	11
Danielson v. *International Organization of Masters, Mates & Pilots, AFL-CIO*, 521 F. 2d 747	8
Danielson v. *Joint Board of Coat, Suit & Allied Garment Workers Union*, 494 F. 2d 1230	7
Dawidoff v. *Minneapolis Bldg. & Const. Trades Council*, 550 F. 2d 407	10
Electrical Workers v. *NLRB*, 341 U.S. 694 (1951)	15

Cases—Continued Page

Giboney v. *Empire Storage Co.*, 336 U.S. 490 14-15
Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418 15
Hirsch v. *Building & Construction Trades Council*, 530 F. 2d 298 10
Humphrey v. *International Longshoremen's Ass'n, AFL-CIO*, 548 F. 2d 494.. 8
Los Angeles Newspaper Guild, Local 69 (Hearst Corporation), 185 N.L.R.B. 303, enforced, 443 F. 2d 1173, cert. denied, 404 U.S. 1018 ..... 11, 12
Miami Newspaper Pressmen's Local No. 46 v. *National Labor Relations Board*, 322 F. 2d 405 11
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 15
NLRB v. *Servette, Inc.*, 377 U.S. 46 13
Sears, Roebuck & Co. v. *Carpet Layers*, 397 U.S. 655 9
Solien v. *United Steelworkers of America, AFL-CIO-CLC*, No. 78-277 C (3) (Apr. 25, 1979) 7
Squillacote v. *Graphic Arts Int'l Union, AFL-CIO Local 277*, 540 F. 2d 853 10
Wilson v. *Milk Drivers & Dairy Employees Union, Local 471*, 491 F. 2d 200....9, 10, 14

Constitution and statute:

United States Constitution, First Amendment 7, 13, 14

Constitution and statute—Continued Page

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
Section 8(b)(4)(ii)(B), 29 U.S.C. 158(b)(4)(ii)(B) 2, 7, 11, 12
Section 10(e), 29 U.S.C. 160(e) 14
Section 10(f), 29 U.S.C. 160(f) 14
Section 10 (*l*), 29 U.S.C. 160(*l*)..... 3, 6, 7, 8, 9, 14

Miscellaneous:

I *Legislative History of the Labor Management Relations Act, 1947* (1948).... 9
S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 9

In the Supreme Court of the United States

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UNITED STEELWORKERS OF AMERICA,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 593 F. 2d 83. The findings of fact and conclusions of law of the district court (Pet. App. 14a-19a) are ~~also~~ not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1979. The petition for a writ of

certiorari was filed on April 24, 1979.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly concluded that the Regional Director had reasonable cause to believe that the Union was promoting a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, and that an injunction should therefore issue pursuant to Section 10(*l*) to restrain such conduct pending the final administrative determination of the unfair labor practice charge.

STATUTE INVOLVED

The National Labor Relations Act (29 U.S.C. 151 *et seq.*), provides in part:

a. Section 8(b), 29 U.S.C. 158(b):

It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

[1] Petitioner applied to this Court for a stay of the mandate of the court of appeals pending the filing and disposition of a petition for a writ of certiorari (No. A-835, October Term, 1978). The application was denied, initially Mr. Justice Blackmun and later by the full Court.

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, * * *

* * * * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution * * *.

b. Section 10(*l*), 29 U.S.C. 160 (*l*):

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred

has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law * * *.

STATEMENT

1. Petitioner (the "Union") represents the production and maintenance employees at the Bridgeton, Missouri, plant of Hussmann Refrigerator Company. Hussmann is one of the numerous subsidiaries and operating divisions of Pet, Inc., a large, diversified conglomerate (Pet. App. 14a-15a). The subsidiaries and divisions of Pet, Inc., engage in a wide variety of business ventures and produce, distribute and sell unrelated products and services (J.A. 175, 178-181).[2] The management of each of the various subsidiaries and divisions is autonomous: each establishes its own product lines; determines its own pricing, advertising and marketing strategies; sets its own profit targets; and pays its own bills, including the cost of any services rendered or products purchased on its behalf by

[2] "J.A." refers to the Joint Appendix in the court of appeals.

the parent corporation (J.A. 175, 177-178, 181). Each subsidiary and division has a president with complete authority in employment and labor relations matters. The division president establishes the wages, benefits and other terms and conditions of employment within his division, and has full authority to negotiate and administer collective bargaining agreements (J.A. 175, 177-178, 28-29).

2. On May 1, 1977, the collective bargaining agreement expired at the Bridgeton plant. Since that date, the Union has been engaged in an economic strike with Hussmann. In support of this strike, the Union president announced at a press conference on October 21, 1977, that the Union would seek "a national boycott * * * of Pet, Inc. food products, their retail store outlets and commercial refrigeration equipment" (Pet. App. 14a-15a). The Union thereafter placed advertisements in newspapers and distributed handbills requesting the general public, including union members and sympathizers, not to patronize any retail stores owned by Pet and to refuse to buy any product produced by Pet and its subsidiaries and divisions (J.A. 265-266, 41-42, 53-55, 143, 179-180). The handbilling was unaccompanied by picketing, was conducted in orderly fashion remote from the premises of any Pet plant or store, and caused no work stoppages by any employees (Pet. App. 15a-16a).

3. In November 1977, Pet filed an unfair labor practice charge with the Board's Regional Director, alleging that the Union was promoting a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the

National Labor Relations Act, 29 U.S.C. 158(b)(4)(ii)(B) (Pet. App. 16a). The Regional Director found that there was reasonable cause to believe that the charge was true and issued an unfair labor practice complaint. Pursuant to Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), the Regional Director also petitioned the United States District Court for the Eastern District of Missouri to enjoin the Union from engaging in its challenged boycott activities pending final resolution of the unfair labor practice charge by the National Labor Relations Board (Pet. App. 14a, 3a).

4. The district court concluded that no evidence has been presented to it to establish "that the Union sought to force, coerce or restrain individuals," or that it "had as its object the forcing of any employer to cease doing business with Hussmann" (Pet. App. 19a), and that the Union's actions therefore "do not fall within the prohibitions of the Act" (*ibid.*). The court accordingly denied the Regional Director's request for injunctive relief.

The court of appeals reversed. The court noted that, under Section 10(*l*) of the Act, the district court must determine only "whether the Board had reasonable cause to believe the Act was being violated as charged, and if it so concludes, it must grant such relief as it deems just and proper" (Pet. App. 9a). The court of appeals concluded that, while "the conduct of the Union cannot readily be characterized as being or as not being a 'secondary boycott' generally prohibited by § 8(b)(4)(ii)(B)," "[u]pon the record now before us, we are convinced that there

was reasonable cause to believe that a violation of the Act had occurred" (Pet. App. 10a).[3] The court remanded the case to the district court with instructions to issue an injunction "as prayed for by the Director," if "the conduct in question is still going on or is likely to be resumed and if the Board's ruling on the issues before it is not to be expected immediately" (*ibid.*).[4]

ARGUMENT

1. Petitioner contends (Pet. 9-14) that the court of appeals applied an incorrect legal standard in directing issuance of the injunction under Section 10(*l*). Petitioner argues that an injunction should not issue under Section 10(*l*) if the court "is convinced that the General Counsel's legal position is wrong" (Pet. 11, quoting *Danielson* v. *Joint Board of Coat, Suit & Allied Garment Workers Union*, 494 F.2d 1230, 1245 (2d Cir. 1974)). It is apparent, however, that in this case the court of appeals was *not* "convinced that the General Counsel's legal posi-

---

[3] With regard to petitioner's claims based on the First Amendments and on the "publicity proviso" of Section 8(b)(4)(ii)(B), the court stated that the arguments "are not insubstantial" but need not be resolved "at this essentially preliminary stage of the unfair labor practice proceeding" (Pet. App. 11a n.3).

[4] On remand, the district court found that the Union "has continued and is continuing to engage in its boycotting activities." The court entered an injunction "limited to ninety days," subject to modification at the expiration of that period. *Solien* v. *United Steelworkers of America, AFL-CIO-CLC*, No. 78-277 C (3) (Apr. 25, 1979) (App., *infra*, 2a-4a).

tion [was] wrong." [5] Thus, even under petitioner's interpretation of the proper legal standard, the injunction was properly issued, and further review of the decision in this case is therefore unwarranted.

a. Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), embodies the determination of Congress that certain unfair labor practices, such as secondary boycotts,

[5] There is thus no conflict between *Danielson* and the decision in this case, as petitioner contends (Pet. 11-12). In *Danielson*, the court refused to sustain the issuance of an injunction under Section 10(*l*) upon finding that the General Counsel's legal theory was "a strained and wholly unnatural construction" of the Act and produced a result that Members of Congress "had assured was not intended by the secondary boycott provisions" of the Act (*id.* at 1237). In a case such as this, where the court found "reasonable cause to believe that a violation of the Act had occurred" (Pet. App. 10a), the Second Circuit has held that an injunction is warranted under Section 10(*l*). *Danielson* v. *International Organization of Masters, Mates & Pilots, AFL-CIO*, 521 F.2d 747, 751 (2d Cir. 1975) ("In determining whether an injunction under § 10(*l*) should issue, it is well settled that the district court need not decide that an unfair labor practice has actually occurred but merely must decide whether the Board has reasonable cause to believe there has been a violation of the Act").

Humphrey v. *International Longshoremen's Ass'n, AFL-CIO*, 548 F.2d 494 (4th Cir. 1977), is also consistent with the decision in this case. The court noted in *Humphrey* that, "while a temporary injunction should not issue unless there is some reasonable possibility that the Board will ultimately enter an enforceable order, the General Counsel's resolution of disputed issues of law and fact should be accorded considerable deference in determining whether such possibility exists" (*id.* at 498). The court concluded in *Humphrey* that the General Counsel had established reasonable cause to believe that a violation of the Act had occurred and that an injunction should issue under Section 10(*l*). 548 F.2d at 497.

threaten particularly serious interruptions to commerce and require particularly swift governmental regulation to avert irreparable injury to the policies of the Act. Thus, in that section, Congress directed the Board's Regional Directors to apply for injunctive relief in the federal district courts whenever the Directors determine that there is reasonable cause to believe that such an unfair labor practice has occurred. The district courts are then to grant such injunctive relief in these cases as is "just and proper." See S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947); I *Legislative History of the Labor Management Relations Act, 1947*, 414, 433 (1948); *Wilson* v. *Milk Drivers & Dairy Employees Union, Local 471*, 491 F.2d 200, 203 (8th Cir. 1974).

The action for an injunction under Section 10(*l*) is ancillary to the unfair labor practice proceedings. The injunction expires when the Board renders its final decision on the underlying unfair labor practice charge. See 29 U.S.C. 160(*l*); *Sears, Roebuck & Co.* v. *Carpet Layers*, 397 U.S. 655 (1970). Accordingly, in a proceeding for an injunction under Section 10(*l*),

> the district court is not called upon to decide whether, in fact, a violation has occurred. The determination of this question is reserved exclusively for the Board with review by the Court of Appeals under section 10(e) and (f) of the Act. The inquiry of the district court is limited to a determination of whether the Board has reasonable cause to believe the Act was being violated as charged, and if it so concludes, it

must grant such relief as it deems just and proper.

Wilson v. *Milk Drivers & Dairy Employees Union, Local 471, supra*, 491 F.2d at 203. See also *Dawidoff* v. *Minneapolis Bldg. & Const. Trades Council*, 550 F.2d 407, 410 (8th Cir. 1977); *Squillacote* v. *Graphic Arts Int'l Union, AFL-CIO Local 277*, 540 F.2d 853, 858 (7th Cir. 1976); *Hirsch* v. *Building & Construction Trades Council*, 530 F.2d 298, 302 (3d Cir. 1976).[6]

b. The court of appeals correctly concluded that "[u]pon the record now before us, * * * there was reasonable cause to believe that a violation of the Act had occurred" (Pet. App. 10a).

The undisputed evidence adduced by the Regional Director showed that the Union, in furtherance of its strike at Hussmann's Bridgeton plant, sought through newspaper advertisements and handbills to induce the general public to boycott *all* retail stores owned by Pet, Inc., and to refuse to buy *any* product produced by Pet, Inc., and its subsidiaries (see page 5, *supra*). The necessary—and presumably intended—effect of this conduct was to "threaten, coerce, and restrain" Pet and its autonomous operating divisions to induce them to pressure Hussmann

[6] As the court of appeals stated in this case (Pet. App. 9a), once the court determines that there is reasonable cause to believe the Act was being violated, the injunction should issue "to permit the Board a reasonable time to make the initial determination which Congress has entrusted it to make."

to accede to the Union's contract demands.[7] The essential elements of a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. 158(b)(4)(ii)(B), were therefore established.

The fact that Hussmann and other subsidiaries of Pet are wholly owned by the parent corporation does not, by itself, make Pet, Hussmann, and the other subsidiaries a single employer such that all may be subjected to union pressure in a labor dispute involving only one of them. Corporate subsidiaries (or even unincorporated divisions of a single corporate entity) are regarded as separate employers in the absence of joint exercise of control over the day-to-day operations or the labor relations of each. Without such day-to-day control, each is insulated by Section 8(b)(4)(ii)(B) of the Act from the labor disputes of the others. See, *e.g.*, *Miami Newspaper Pressmen's Local No. 46* v. *National Labor Relations Board*, 322 F.2d 405, 409 (D.C. Cir. 1963); *Bachman Machine Co.* v. *National Labor Relations Board*, 266 F.2d 599 (8th Cir. 1959); *Los Angeles Newspaper Guild, Local 69 (Hearst Corporation)*, 185 N.L.R.B. 303 (1970), enforced, 443 F.2d 1173 (9th Cir. 1971), cert. denied, 404 U.S. 1018 (1972); *American Federation of Television & Radio Artists, Washington-Baltimore Local, AFL-CIO (Baltimore News American Division, Hearst Corporation)*, 185 N.L.R.B. 593 (1970), enforced, 462 F.2d 887 (D.C.

[7] As the district court noted, "it is obvious that the Union sought [the] consumer boycott * * * to exert the maximum * * * pressure * * * upon Hussmann to end its dispute with the Union" (Pet. App. 19a).

Cir. 1972). As is shown at pages 4-5, *supra*, each Pet subsidiary and division is operated as a separate, independent business entity, and the president of each division has almost complete control over its daily operations and labor relations.[8]

There is also reasonable cause to believe that the Union's activity is not protected as "publicity" or truthful advertising by the second proviso to the secondary boycott prohibition in Section 8(b)(4)(ii)(B).[9] This proviso applies only when the advertising or publicity is designed to inform the public that an employer is distributing products produced by another

[8] Pet retains control over the financial policies of the divisions. The profits or losses of the divisions pass directly to Pet, and the divisions are consolidated for financial and tax purposes. As the Board observed in *Los Angeles Newspaper Guild, Local 69 (Hearst Corporation)*, *supra*, 185 N.L.R.B. at 304, however, this is "inherent in common ownership," and does not reflect the exercise of any actual, centralized control over the separate operations.

[9] That proviso reads (29 U.S.C. 158(b)(4)(ii)(B)):

> *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution * * *.

employer with whom the union has a primary labor dispute. See *ibid.*; *NLRB* v. *Servette, Inc.*, 377 U.S. 46 (1964). Since petitioner was enjoined from directing its publicity only at those subdivisions of Pet. which cannot be said to "distribute" products or services "produced" by Hussmann (App., *infra*, 4a) the proviso is inapplicable to this case.[10]

2. Contrary to petitioner's assumption, the court of appeals did not enjoin "indefinitely conduct that may be privileged by the First Amendment without first adjudicating whether the activity is, in fact, so privileged" (Pet. 16). An injunction under Section 10(*l*) is effective only until a final Board adjudication of the unfair labor practice charge. In this case, the district court has limited its injunction to a period of 90 days and has carefully structured the scope of the injunction to ensure that the Union's First Amendment rights would not be infringed during that period (App., *infra*, 2a-4a). Moreover, the question whether a limited ban on the Union's con-

[10] Contrary to petitioner's contention (Pet. 7), *NLRB* v. *Servette, Inc.*, *supra*, is not inconsistent with this conclusion. In *Servette*, the Court approved the Board's application of the publicity proviso to cases where the primary employer was the wholesaler of products sold by the target of the publicity, holding that "[i]t would fall far short of achieving [its] basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor" (*id.* at 55). *Servette* does not hold that the proviso protects a consumer boycott appeal where, as here, there are no business dealings between the primary employer and the neutral employers sought to be boycotted.

sumer boycott campaign would violate the First Amendment was fully briefed and argued by all parties. The court of appeals specifically noted that the "claims of the Union based on the first amendment * * * are not insubstantial" (Pet. App. 11a n.3). Although the court did not finally resolve petitioner's First Amendment contentions "at this essentially preliminary stage" (*ibid.*), there is nothing to suggest that the court did not consider those contentions in making a reasonable cause determination under Section 10(*l*). Rather, it appears that the court concluded that, while petitioner's contention is not insubstantial, the arguments advanced by the Regional Director were sufficiently substantial to justify the issuance of a temporary injunction pending a final adjudication of the matter of the Board. The Board's ultimate decision on the merits is, of course, subject to further review by the court pursuant to Section 10(e) or (f) of the Act. *Wilson* v. *Milk Drivers & Dairy Employees Union, Local 471, supra,* 491 F.2d at 203.

In any event, petitioner is mistaken in contending (Pet. 15) that the Act violates the First Amendment by prohibiting the distribution of handbills and the publication of newspaper advertisements that call for a secondary boycott of a neutral employer. "[I]t has never been deemed [to be] an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney* v. *Empire Stor-*

age Co., 336 U.S. 490, 502 (1949). This is particularly true in the area of labor-management relations. See, *e.g., NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 616-620 (1969); *Electrical Workers* v. *NLRB,* 341 U.S. 694, 703-705 (1951). Union-sponsored publicity that specifically calls for economic action against a neutral employer does more than merely "disseminate information" or simply express the union's view regarding the merits of the dispute. It is economic action that may be constitutionally regulated by Congress through its plenary power to regulate and promote interstate commerce. See *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 439 (1911).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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JUNE 1979

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-277 C (3)

JOSEPH H. SOLIEN, ETC., PETITIONER

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, RESPONDENT

MEMORANDUM

On March 19, 1979, the United States Court of Appeals for the Eighth Circuit issued its mandate herein, remanding this cause to the Court for further proceedings in accordance with the opinion of the Court of Appeals. Said opinion provides in relevant part:

> . . . the district court should determine whether and to what extent the Union conduct complained of is being continued or is likely to be resumed and the status of the proceeding before the Board. If it appears to the district court that the conduct in question is still going on or is likely to be resumed and if the Board's ruling on the issues before it is not to be expected immediately, an injunction should issue as prayed for by the Director. We leave the question of duration of the injunction in the first instance to the discretion of the district court. In any

> event, if it appears that agency action is being unreasonably delayed, the Union may apply under Fed. R. Civ. P. 60(b) for a modification of the terms of or dissolution of the injunction. *Solien* v. *United Steelworkers of America, AFL-CIO-CLC*, No. 78-1411 (8th Cir. February 22, 1979), slip opinion at p. 14-15.

From the record before this Court, it appears that respondent has continued and is continuing to engage in its boycotting activities. Petitioner has advised this Court by motion that "it is very unlikely that the decision of the National Labor Relations Board will be issued within the next 90 days". As noted by the Court of Appeals, however,

> . . . the parties have waived a hearing before an administrative law judge and submitted the case to the Board on an agreed record. Slip opinion at p. 15, footnote 2.

Based on this record, an injunction will issue. Its duration will be limited to ninety days. At the expiration of such period, either party may seek modification.

/s/ John P. Nangle
United States District Judge

Dated: April 25, 1979.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-277 C (3)

JOSEPH H. SOLIEN, ETC., PETITIONER

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, RESPONDENT

ORDER

Pursuant to the memorandum filed this date, and in accordance with the mandate of the United States Court of Appeals for the Eighth Circuit,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that pending final disposition of the matters involved herein now pending before the National Labor Relations Board, or the expiration of ninety days from this date, whichever occurs sooner, respondent United Steelworkers of America, AFL-CIO-CLC, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it, be and are enjoined and restrained from:

> Engaging in, or permitting to remain in existence or effect, any publicity campaign directed against Stuckey's, Inc.; Southland Canning and Packing Company, Inc.; Violet Packing Company, Inc.; Mountain Pass Canning Company; Old El Paso; Gulf Belle & Orleans; Fungston

Nuts; Whitman's Chocolates; Mr. Panel; Vendrom Liquor Stores; Reese Finer Foods; Musselman Fruit Products; or Pet, Incorporated, its subsidiaries and divisions, except its Bridgeton, Missouri Division of Hussmann Refrigerator Company and Hussman's distributors, or in any manner or by any means, including picketing, orders, directions, instructions, requests or appeals, however given, made or imparted, or by any like or related acts or conduct or by permitting any such to remain in existence or effect, threatening, coercing or restraining any other person engaged in commerce or in any industry affecting commerce where an object thereof is to force or require their customers to cease doing business with such persons or to cause such persons to cease doing business with each other or with Hussmann Refrigerator Company.

/s/ John P. Nangle
United States District Judge

Dated: April 25, 1979.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 295212 9

Supreme Court, U. S.
FILED
JUN 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1634

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF REGION 14 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, AND PET, INCORPORATED,
Respondents.

BRIEF OF RESPONDENT PET, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Argument	5
Conclusion	7
Certificate of Service	8

Table of Authorities

Cases:

Bachman Machine Co. v. National Labor Relations Board, 266 F. 2d 599, 605 (C.A. 8 1969)	4
Danielson v. Joint Board of Coat, Suit and Allied Garment Workers Union, 494 F. 2d 1230 (2d Cir. 1974)	5
Drivers, Chauffeurs and Helpers Local 639 (Poole's Warehousing, Inc., 158 NLRB 1281, 1285-1286 (1966)	4
Electrical Workers v. National Labor Relations Board, 341 U.S. 694, 705 (1951)	6
Humphrey v. International Longshoremen's Association, AFL-CIO, 548 F. 2d 494 (4th Cir. 1977)	5
J. G. Roy & Sons Co. v. National Labor Relations Board, 251 F. 2d 771, 773-774 (C.A. 1)	4
Miami Newspaper Printing Pressmen's Local No. 46 v. National Labor Relations Board (Knight Newspapers, Inc.), 322 F. 2d 405, 408-409 (C.A. D.C. 1963)	4

National Labor Relations Board v. Fruit & Vegetable Packers & Warehousemen (Tree Fruits), 377 U.S. 58 (1964) 6
National Labor Relations Board v. Local 825, Operating Engineers, 400 U.S. 297, 302-303 (1971) 6

San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541 (9th Cir. 1969) 4

Statutes:

28 U.S.C. § 1254(1) 2

National Labor Relations Act, 29 U.S.C. § 160 .....2, 4, 5, 6

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AND PET, INCORPORATED,
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BRIEF OF RESPONDENT PET, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent PET, INCORPORATED, opposes the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit. The decision below is correct and consistent with the statutory language and the applicable case law.

JURISDICTION

The opinion and judgment of the court of appeals was entered on February 22, 1979 (Pet. App. 1a-12a).[1] The petition

[1] On March 14, 1979, the court of appeals denied petitioner's request for a stay of mandate. On April 3, 1979, Mr. Justice Blackmun denied a stay of mandate and on April 16, 1979, the application for stay addressed to Mr. Justice Brennan was referred to the Court and denied.

for certiorari was filed April 24, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The issues presented in the petition for certiorari do not arise on the record below. The questions posed by the petition for certiorari imply that the court of appeals believed that the union's conduct is lawful. This is not so.

STATUTE INVOLVED

The revelant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 160) is set forth at Pet. 3.

STATEMENT

Respondent Pet, Incorporated (hereinafter "Pet") filed a charge with the Regional Director of the National Labor Relations Board alleging that the United Steelworkers of America, AFL-CIO-CLC (hereinafter "Petitioner") was violating Section 8(b)(4) of the National Labor Relations Act (hereinafter "Act"). Upon determining that a complaint should issue on the charge, the Regional Director petitioned the United States District Court for the Eastern District of Missouri, pursuant to Section 10(1) [29 U.S.C. 160(1)] of the Act, for an injunction pending a final decision by the Board (Pet. 4-5). The district court denied injunctive relief and dismissed the petition (Pet. App. 20a).

The Regional Director appealed and the court of appeals reversed the district court because it was "convinced that there

was reasonable cause to believe that a violation of the Act had occurred" (Pet. App. 10a). The court of appeals explained its reversal of the district court as follows:

> "We are concerned with contentions that the Union's appeals for a consumer boycott of Pet's divisions and their products in support of the Union's dispute at the Bridgeton plant unlawfully restrained and coerced Pet and its divisions. We are concerned with the question of whether the boycott was pursued unlawfully for the object of causing Pet's divisions to cease doing business with their customers, suppliers and distributors and to cause their customers, suppliers and distributors to cease doing business with Pet and its divisions. In these areas especially, we are impelled to the conclusion that in holding that the conduct in question did not violate the Act in denying the injunction on the basis of that holding the trial judge exceeded permissible limits of district court inquiry under § 10(a)(1).
>
> Upon the record now before us, we are convinced that there was reasonable cause to believe that a violation of the Act had occurred. Accordingly, the judgment of the district court must be reversed and the cause remanded with directions." (Pet. App. 10a).

There is no dispute between the parties as to the material facts (Pet. 5). The petitioner has no labor dispute with Pet. Petitioner has engaged in a total boycott of all products sold or produced by Pet or any of its divisions. Petitioner's sole dispute is with Hussmann Refrigerator Company (hereinafter "Hussmann") a wholly owned subsidiary of Pet (Pet. App. 2a and 2b). The petitioner's handbills, newspaper advertisements, and other appeals for a total boycott of Pet is in furtherance of its dispute with Hussmann (Pet. App. 2a). Under the Act, Pet

and its divisions other than Hussmann are neutral, unoffending employers, and are not parties to the Hussmann labor dispute.[2]

[2] The "Board and the courts have consistently and repeatedly held that common ownership alone does not suffice [to remove the protective shield of Section 8(b)(4)(B)]. There must be something more in the form of common control, as it is usually phrased, denoting an actual, as distinct from merely a potential, integration of operations and management policies. Two business enterprises, although commonly owned, do not for that reason alone become so allied wtih each other as to lift the congressional ban upon the extension of labor strife from the one to the other." *Miami Newspaper Printing Pressmen's Local No. 46 v. National Labor Relations Board (Knight Newspapers, Inc.)*, 322 F. 2d 405, 408-409 (C.A. D.C. 1963) Accord: *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F. 2d 541 (9th Cir. 1969); *J. G. Roy & Sons Co. v. National Labor Relations Board*, 251 F. 2d 771, 773-774 (C.A. 1); *Bachman Machine Co. v. National Labor Relations Board*, 266 F. 2d 599, 605 (C.A. 8 1969); *Drivers, Chauffeurs and Helpers Local 639 (Poole's Warehousing, Inc.*, 158 NLRB 1281, 1285-1286 (1966)).

ARGUMENT

The unanimous decision of the court of appeals is correct. That decision is consistent with the statutory language and the decisions of other courts of appeal. Pet respectfully submits that no issue warranting further review is presented.

1. Contrary to petitioner's contention the record in this case does not present the question as to whether a 10(1) injunction should issue "against conduct which the court believes is lawful." The court of appeals in the instant case expressly stated that "we are convinced that there was reasonable cause to believe that a violation of the Act had occurred" (Pet. App. 10a). Petitioner cites no case in which any court of appeals has sustained the denial of a 10(1) injunction under such circumstances.

The two court of appeals decisions upon which petitioner relies are not in conflict with the decision of the court of appeals in the instant case. Indeed, in *Humphrey v. International Longshoremen's Association, AFL-CIO*, 548 F. 2d 494 (4th Cir. 1977) the majority of the court held that the district court erred in refusing to issue the 10(1) injunction because "we conclude that appellant [Regional Director] has ample reasonable cause to believe that appellees are violating the Act."

The other decision relied upon by petitioner, *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers Union*, 494 F. 2d 1230 (2d Cir. 1974), is not in conflict with the decision of the court of appeals in the instant case. In the *Danielson* case, the court of appeals held that a district court should not issue an injunction if it is convinced that the General Counsel's legal position is wrong. Manifestly, that decision has no relevance and is not inconsistent with decision of the court of appeals in the instant case.

Courts of appeal may utilize different phraseology from time to time to rationalize their conclusion in a particular case that the statutory requirement of reasonable cause has *not* been satisfied. Such cases are totally irrelevant to the instant case since the court of appeals had no doubt that the Regional Director was correct in his belief that the Act was being violated.

2. Nor is there substance to petitioner's further contention that its appeals for a total boycott of all Pet products are protected by the First Amendment and/or the publicity proviso to Section 8(b)(4) of the Act (Pet. 14-17). Section 8(b)(4) of the Act prohibits the enmeshing of neutral employers in disputes not their own, where an object is to force the cessation of business between the neutral employer and any other person. *National Labor Relations Board v. Local 825, Operating Engineers*, 400 U.S. 297, 302-303 (1971). This Court has rejected union attacks upon the constitutionality of the secondary boycott provisions of the Act. "The prohibition of inducement or encouragement of secondary pressure by § 8(b) 4)(A) [now § 8(b)(4)(B)] carries no unconstitutional abridgement of free speech." *Electrical Workers v. National Labor Relations Board*, 341 U.S. 694, 705 (1951). First amendment considerations guided this Court in its interpretation of the publicity proviso to Section 8(b)(4) of the Act in *National Labor Relations Board v. Fruit & Vegetable Packers & Warehousemen (Tree Fruits)*, 377 U.S. 58 (1964). While a union's right to inform the public that a store is selling a struck product may be constitutionally protected, a union's appeal to stop all trading with the secondary employer is not protected by the first amendment. Neither the Constitution nor the proviso to 8(b)(4) grants the petitioner the right to appeal for a total boycott of products produced by employers with whom the petitioner has no dispute.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated. June 12, 1979

Certificate of Service

I hereby certify that copies of Brief of Respondent Pet, Incorporated in opposition to the petition for writ of certiorari were served upon each of the following by first class mail at the addresses listed below:

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Supreme Court, U. S.
FILED
SEP 19 1979
MICHAEL RODAK, JR., CLERK

No. 78-1634

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
PETITIONER

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF REGION 14 OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1634

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

On August 10, 1979, the Board issued its decision in the unfair labor practice proceeding, concluding that petitioner Union's handbilling and other publicity did not violate Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B). Accordingly, the Board dismissed the complaint that had been issued against the Union. *United Steelworkers of America, AFL-CIO-CLC (Pet, Inc.)*, 244 N.L.R.B. No. 6.[1]

---

[1]The Board concluded that Hussmann was a "producer" of Pet products within the meaning of the proviso to Section 8(b)(4) of the Act. (The proviso is set out at Br. in Opp. 3). The Board explained (slip op. 18-19):

> [A] union can lawfully urge, via handbilling or other non-picketing publicity, a total consumer boycott of a neutral

The question raised by the petition—whether the court of appeals properly ordered the issuance of an injunction here—is thus no longer a live issue. By its terms, Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), authorizes the issuance of an injunction only "pending the final adjudication of the Board with respect to [the] matter." Since the Board has issued its decision dismissing the complaint, there has been a "final adjudication of the Board," and there is no longer any basis for a Section 10(*l*) injunction. Moreover, the injunction issued by the district court expired by its own terms on September 11, 1979. Therefore, this case has become moot.[2]

Because the case became moot after the decision of the court of appeals, and the petition would not otherwise have been granted, this Court should deny the petition rather than vacating the judgment below. The reasons why this is the appropriate course are discussed in our brief in opposition in *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978), a copy of which we are serving on petitioner. See also our briefs in *Aqua*

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employer, so long as the primary employer has at some stage produced, in the sense of applying capital, enterprise, or service, a product of the neutral employer. Applying these principles to the facts herein, we find that as a result of its relationship with the diversified Pet enterprise, Hussmann applies capital, enterprise, and service to Pet and its other subsidiaries and divisions. We therefore conclude that Hussmann is a "producer" of the products of Pet and its other subsidiaries and divisions as that term is used in the publicity proviso and that [the Union's] total consumer boycott of said products is thus exempt from the proscriptions of Section 8(b)(4) of the Act.

[2] *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974), is not to the contrary. There, petitioners, in addition to seeking injunctive relief, sought declaratory relief challenging the legality of a state statute. The court held that their interest in resolution of the latter issue survived the dissolution of the injunction. Here, the issues raised in the petition go only to the propriety of issuance of the injunction, which is now an academic matter.

Media, Ltd. v. *United States*, cert. denied, 439 U.S. 959 (1978), and *Texas State Board of Public Accountancy* v. *United States*, petition for cert. pending, No. 78-1811.

For these reasons, as well as those discussed in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board

SEPTEMBER 1979

DOJ-1979-09

Supreme Court, U. S.
FILED
SEP 21 1979
MICHAEL RODAK, JR., CLERK

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Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE OF PETITIONER TO SUPPLEMENTAL MEMORANDUM FOR FEDERAL RESPONDENT

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RESPONSE OF PETITIONER TO SUPPLEMENTAL MEMORANDUM FOR FEDERAL RESPONDENT

Petitioner United Steelworkers of America, AFL-CIO-CLC ("USWA"), filed this petition for a writ of certiorari to seek review of the decision of the court of appeals directing the district court to enjoin USWA from continuing a publicity campaign urging consumers not to purchase products manufactured by or patronize stores owned by respondent Pet, Inc. The appellate decision which is challenged here construed § 10(*l*) of the National Labor Relations Act to mandate such an injunction without permitting inquiry into whether USWA was likely to prevail on the

merits of its legal defenses to the respondent Regional Director's charge that USWA's publicity campaign violated § 8(b)(4) of the Act—that is, without inquiring into the merits of USWA's claim that its conduct was protected by both the publicity proviso to § 8(b)(4) and by the First Amendment. Pursuant to the terms of the appellate court's mandate, the district court issued a § 10(*l*) injunction against USWA shortly after our petition for certiorari was filed.

Respondent Regional Director has filed a Supplemental Memorandum in which he correctly reports: that on August 10, 1979, the National Labor Relations Board ("NLRB") issued its decision in the unfair labor practice proceeding involving the publicity campaign that gave rise to this action; that the NLRB found that USWA's publicity proviso defense—the merits of which the court below had precluded from the injunction inquiry—was valid and thus that the previously-enjoined publicity campaign did *not* violate § 8(b)(4); and that by virtue of the issuance of the NLRB decision, the injunction against the USWA terminated. Respondent contends that consequently the case is moot.

If, as respondent urges, the issuance of the NLRB decision moots this proceeding, the appropriate disposition here would be to vacate the opinion of the court of appeals as moot and remand the case with instructions that it be dismissed. Indeed respondent concedes that in such circumstances that would be the appropriate disposition "[i]f . . . the Court might have granted the petition but for the problem of mootness."[1] And, mootness aside, as we showed in

[1] Brief for the United States in *Velsicol Chemical Corp.* v. *United States* at 6, incorporated by reference in the Supplemental Memorandum for Federal Respondent in the instant case at 2-3.

our petition for a writ of certiorari, the questions presented in this case would warrant plenary consideration by this Court.

Accordingly, if the Court agrees with respondent that the case is moot, the judgment of the court of appeals should be vacated with instructions to dismiss the case as moot.

Respectfully submitted,

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